

**Lerman v 2211 Third Ave. Mazal Holdings LLC**

2023 NY Slip Op 32210(U)

June 30, 2023

Supreme Court, New York County

Docket Number: Index No. 654567/2022

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

*Justice*

-----X

ASAF LERMAN

Plaintiff,

- v -

2211 THIRD AVENUE MAZAL HOLDINGS LLC,

Defendant.

-----X

INDEX NO. 654567/2022

MOTION DATE 06/29/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 24, 25, 26, 27, 28, 34, 35, 38, 40, 41

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Plaintiff's motion to reargue is granted, an upon reargument, the Court vacates its decision as described below.

**Background**

Plaintiff commenced this action, via a motion for summary judgment in lieu of complaint, to recover on a \$700,000 promissory note. The Court granted that motion and awarded plaintiff \$490,000 plus statutory interest from the date the lawsuit was commenced.

Plaintiff now moves to reargue on the ground that this Court did not properly include the interest that accrued on the note. Plaintiff claims that after applying a payment from defendant, the balance was \$539,000 instead of the \$490,000 awarded by the Court. He also argues that the note clearly provides for interest to be added to the principal both before and after defendant's default. Plaintiff acknowledges that although the promissory note failed to specify a default interest rate, defendant is not entitled to receive an interest free loan. He claims that the default rate is "implicit in the Promissory Note."

In opposition, defendant insists that there is no reason for this Court to reconsider the application of interest and that plaintiff's attempt to argue about the parties' intent to include interest is without merit.

In reply, plaintiff insists that the note was supposed to incur interest and that the Court overlooked that fact in the previous decision. Plaintiff argues that as of December 2020, defendant owed plaintiff \$630,630 when including the applicable interest.

### **Discussion**

Because plaintiff has successfully shown that the Court overlooked the ambiguity in the note, the Court grants the motion for reargument and, upon reargument, the Court vacates its previous decision and denies the motion for summary in lieu of complaint. The Court previously awarded nine percent interest (the statutory amount) as it was unclear what interest rate applied. Plaintiff is certainly correct that the note included the application of interest. However, the note is wholly unclear about the precise application of the interest rate and so the Court finds that it can no longer grant relief under CPLR 3213, as the sum for which plaintiff seeks is not readily ascertainable.

The Court observes that the interest rate (the regular interest rate is set at 12%) plaintiff focuses on in the promissory note is defined as "'Applicable Interest Rate' means the Regular Interest Rate from December \_\_, 2018 until the Maturity Date or the Extended Maturity Date, if applicable, and the Default Interest Rate upon (i) the occurrence and during the continuance of an Event of Default or (ii) after the Maturity Date until the Loan is repaid in full" (NYSCEF Doc. No. 27 at 1). Unfortunately, this instrument does specify a date for the extended maturity date (it is defined as "December [ ], 2020" (*id.*)). Therefore, the Court is unable to calculate the applicable interest from the time the note was executed until this undefined maturity date.

And, of course, it is undisputed that the default interest rate is not defined at all. "A document does not qualify for CPLR 3213 treatment if the court must consult other materials besides the bare document and proof of nonpayment, or if it must make a more than de minimis deviation from the face of the document" (*PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 495 [1st Dept 2017]). The Court cannot, on a CPLR 3213 application, simply impose an interest rate that plaintiff asserts is "implied" in the note. That must be decided as part of a plenary action.

Accordingly, it is hereby

ORDERED that the plaintiff's motion to reargue is granted, and upon reargument, the Court denies plaintiff's motion for summary judgment in lieu of complaint; and it is further

ORDERED that plaintiff shall serve a formal complaint upon defendant's attorney within 20 days of service on plaintiff's counsel of a copy of this order with notice of entry (or plaintiff serving defendant's counsel with the order with notice of entry) and defendant shall answer or otherwise respond to the complaint within 20 days after service thereof; and it is further


ORDERED that the matter is restored to the active calendar; and it is further

ORDERED that, within 7 days from entry of this order, either party shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that upon receipt of the foregoing, the Clerk of the General Clerk’s Office shall immediately restore the case to the active calendar.

Conference: September 5, 2023 at 12 p.m. By August 29, 2023, the parties are directed to upload 1) a stipulation signed by all parties concerning discovery, 2) a stipulation of partial agreement about discovery that identifies the areas in dispute or 3) letters explaining no agreement about discovery could be reached. Based on these submissions, the Court will assess whether or not an in-person conference is necessary. The failure to upload anything by August 29, 2023 will result in an adjournment of the conference.

6/30/2023			
DATE			ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
	<input type="checkbox"/> DENIED	<input type="checkbox"/> SUBMIT ORDER	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		